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Ryan Q. Hodges v. Reese S. Howel; and Salt Lake Mortgage Corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RYAN Q. HODGES, an individual Plaintiff-Appellant, v. REESE S. HOWELL, an individual, and SALT LAKE MORTGAGE CORPORATION, a Utah Corporation, Defendants-Appellees.	Appeal No. 990606-CA District Case No. 980910505 Argument Priority 15
REESE S. HOWELL, Third-Party Plaintiff, v. LINDA M. HODGES, Third-Party Defendant.	

BRIEF OF APPELLANT RYAN Q. HODGES

Appeal from the Third District Court
of Salt Lake County
Honorable Homer F. Wilkinson

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PARTIES TO THIS APPEAL

Ryan Q. Hodges ("Hodges") is the plaintiff/appellant in this matter. Defendant Reese S. Howell ("Howell") is the defendant/appellee. There are no other parties to this appeal.

TABLE OF CONTENTS
Brief of Appellant

Page

TABLE OF AUTHORITIES
Brief of Appellant

Cases

Statutes, Rules and Other Related Authorities

Statutes

Page

Rules

Page

APPELLANT'S BRIEF

I. Statement of Jurisdiction

Hodges appeals the final order dismissing his claims against Howell as signed by the Honorable Homer F. Wilkinson on June 16, 1999. (R. at 210). Rule 54(b) certification was not necessary as the June 16, 1999 order dismissed all remaining claims between the parties.[1] Hodges timely filed a Notice of Appeal on July 12, 1999.[2] There are no pending claims, post judgment motions or parties before the trial court. The Utah Supreme Court has jurisdiction in this matter pursuant Utah Code Ann. § 78-2-2(3)(j) (1996).

II. Statement of the Issues Presented for Review and Standard of Review

Two issues are presented for review.

First, did the trial court err when it held that the one-year statute of limitations for seduction found at Utah Code Ann. § 78-12-29(4) (1996) also

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[1] A previous order dated March 8, 1999 dismissed Hodges' claims against Howell's company and the employer of Hodges' wife, namely Salt Lake Mortgage Company. (R. at 104). The June 16, 1999 order not only dismissed Hodges' remaining claims but also dismissed the third party complaint filed by Howell and Salt Lake Mortgage Company which sought to compare the fault of Linda Hodges. These two orders together dismissed the matter in its entirety and both are attached as Exhibit "A" to the Addendum of this brief.

[2] A copy of Hodges' Notice of Appeal is attached as Exhibit "B" to the Addendum of this brief.

applies to alienation of affection claims even though the tort of alienation of affections is not specifically enumerated therein.

Second, did the trial court err in granting Howell's Motion for Summary Judgment when it determined that there were no genuine disputes as to any of the material facts associated with the question of when Hodges' claim for alienation of affections accrued and further failed to make findings of fact which would support its ruling that Hodges' claim for alienation of affections accrued more than one year prior to the filing of his complaint.

On appeal, the question of whether summary judgment is appropriate is a question of law. Consequently, no deference is given to the trial court's decision. The same is true for the trial court's determination of which statute of limitation applies to a particular cause of action. Therefore, these issues are examined for correctness. See Wilson v. Valley Mental Health, 969 P.2d 416, 418 (Utah 1998); Klinger v. Kightly, 791 P.2d 868 (Utah 1990).

The trial court's findings of fact are given deference and reviewed under a clearly erroneous standard keeping in mind that the facts must be viewed in a light most favorable to the non-moving party. See Bountiful v. Riley, 784 P.2d 1174 (Utah 1989); see also Owns v. Garfield, 784 P.2d 1187, 1188 (Utah 1989). On appeal, a party challenging the trial court's findings of fact must fully and accurately marshall the facts adverse to his or her position and demonstrate that

the evidence did not support such a conclusion. Child v. Gonda, 972 P.2d 425, 433-34 (Utah 1998). The adequacy of a trial court's findings of fact must be sufficiently detailed and include enough facts to show the evidence upon which they are grounded. Woodward v. Fazzio, 823 P.2d 474 (Ut. Ct. App 1991). Inadequate findings of fact warrant remand for more detailed findings. Id. at 478.

Hodges preserved these arguments in his Memorandum in Opposition to Howell's Motion for Summary Judgment where he argued that the residual four-year statute of limitations applies to his alienation of affection claims. (R. at 166-89). He likewise argued that material questions of fact existed regarding when his claim for alienation of affections accrued such that summary judgment was not proper. Id.

III. Determinative Statutes

The trial court accepted Howell's arguments that Utah Code Ann. § 78-12-29(4) (1996), which establishes a one-year statute of limitations for the tort of seduction, also applies to alienation of affections claims. Section 78-12-29(4)(1996) provides as follows:

> An action may be brought within one year:
>
> (1) for liability created by the statutes of a foreign state;
> (2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;

(3) upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;
(4) for libel, slander, assault, battery, false imprisonment, or seduction;
(5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;
(6) against a municipal corporation for damages or injuries to property caused by a mob or riot;
(7) on a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:
(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to four-years, under Section 25-6-10; or
(b) Subsection 25-6-6(2).

(Emphasis added). Hodges argues that § 78-12-29(4) is not applicable to a claim for alienation of affections and, instead, asserts that Utah Code Ann. §78-12-25 (3) establishes the statute of limitations applicable to alienation of affection claims. It states as follows:

An action may be brought within four years:

(1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:
(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;
(b) Subsection 25-6-5(1)(b); or
(c) Subsection 25-6-6(1);

(3) for relief not otherwise provided for by law.

(Emphasis added). Copies of these two statutes are attached as Exhibit "C" to the Addendum of this brief for the convenience of the Court and counsel. There are no other statutes or cases in Utah which are determinative of the issues presented for review.

IV. Statement of the Case

This litigation arises out of the purposeful and predatory conduct of Howell wherein he pursued the affections of Linda Hodges, the then wife of Hodges and mother of his children.[3] Knowing full well that Linda Hodges was married to Hodges, Howell, through his money and position of power as Linda Hodges' employer, succeeded in his pursuit of Linda Hodges which led to an illicit affair and the eventual breakup of the Hodges' marriage and family through divorce. To this day, Howell and Linda Hodges are a couple and share between themselves the most intimate of affections. (R. at 167-71).

Linda Hodges eventually filed for divorce and the divorce was finalized on February 4, 1998. (R. at 169, 171). Thereafter, Hodges filed suit against Howell and his company, Salt Lake Mortgage Company, on October 20, 1998, alleging that Howell's intentional pursuit of Linda Hodges during her marriage to Hodges

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[3]Ryan and Linda Hodges were married on April 14, 1983. They had three children during their marriage -- Megan, Daks and Madison. (R. at 167, n. 1)

constituted a purposeful effort to secure her affections and, at the same time, alienate her affections towards Hodges. (R. at 1-7). Hodges' principal cause of action against Howell is the tort of alienation of affections ("AOA"). Id.

Howell moved for summary judgment based on the statute of limitations found at Utah Code Ann. § 78-12-29(4) (1996) which establishes a one-year limitations period for the tort of seduction, not AOA. (R. at 111-61). Howell further argued that the facts showed that Hodges knew that his relationship with his wife and her affections for him were irretrievably broken by January 20, 1997. (R. at 116-17). Applying this fact to the alleged one-year statute of limitations, argued Howell, demonstrated that the deadline for Hodges to file his AOA claim was January 20, 1998. Thus, Hodges complaint, which was filed on October 20, 1998, was untimely and barred by the one-year statute of limitations for the tort of seduction. (R. at 117-20).

Hodges opposed Howell's Motion for Summary Judgment. (R. at 166-89). Hodges argued that the statute of limitations for the tort of seduction does not apply to the tort of AOA because AOA is unrelated -- in every way -- to the tort of seduction. Hodges argued further that the applicable statute of limitations for his AOA claim is Utah's four-year residual or "catch-all" statute of limitation found at Utah Code Ann. §78-12-25 (1996). (R. at 177-79).

Hodges also disputed Howell's "Statement of Undisputed Material Facts" and set forth additional facts which demonstrated that genuine issues of material fact exist as to when his cause of action for AOA accrued -- even if the one-year statute of limitations applied. (R. at 179-80).

The trial court granted Howell's Motion for Summary Judgment based on the briefs filed by the parties and without conducting oral argument on the matter. The trial court held that the one-year statute of limitations for the tort of seduction enumerated at Utah Code Ann. § 78-12-29(4) also applies to claims for AOA. The trial court further ruled that the facts demonstrated that Hodges' AOA cause of action accrued more than one-year prior to the filing of his complaint. In its minute entry, the trial court did not acknowledge or address the facts submitted by Hodges in opposition to Howell's motion for summary judgment; nor did it make any findings of fact as to when Hodges' AOA cause of action accrued. Instead, the trial court simply stated that Hodges' AOA claim accrued more than one year prior to the filing of his complaint on October 20, 1999. (R. at 208; see also Order and Final Judgment, R. at 211, ¶ 1).

A. Statement of Facts

In support of his position that the trial court erred when it determined that his cause of action for AOA accrued more than one year prior to the filing of his complaint, Hodges marshalls the following pertinent facts demonstrating that

genuine issues of material fact exist as to when his cause of action for AOA accrued for statute of limitations purposes.

1. Ryan and Linda Hodges were married on April 14, 1983. (R. at 113).

2. In the Fall of 1995, Hodges learned of his wife's ongoing friendship with Howell and that it was beginning to impact the Hodges' marriage. (R. at 113-14, 153-54).

3. The Hodges remained together through the majority of 1996. However, in the late Fall of 1996 they separated for a period of time. (R. at 114, 140-41).

4. The Hodges reconciled and resumed living together in December of 1996. (R. at 140).

5. On January 20, 1997, Hodges saw his wife with Howell and was concerned that their marriage may be headed for divorce rather than reconciliation. (R. at 116, 142). In fact, he stated that he knew they were going to get a divorce at that time. (Id.)

6. Even though Hodges moved out of their home shortly thereafter, Hodges had not made up his mind to seek a divorce and he still held out hope that he and his wife would reconcile and that she would consider terminating her relationship with Howell. (R. at 143-45).

7. In fact, the Hodges attended marriage counseling sessions together in late 1996 and in the first quarter of 1997. (R. at 139).

8. Hodges continued to want to work on his marriage and still hoped for reconciliation including up and through the time of their last counseling session in the first quarter of 1997. (R. at 186 (Hodges deposition page 157)).

9. Linda Hodges filed for divorce in late January of 1997. (R. at 4).

10. In the first quarter of 1997, Hodges and his wife decided to sell their home. The home sold in May or June of 1997. (R. at 117, 150-51)

11. In the summer of 1997, Hodges began dating another woman, six months after he and Linda Hodges separated for the last time in January of 1997. (R. at 117, 138).

12. Throughout the divorce process, Hodges remained hopeful and believed there was a chance he and his wife could reconcile. (R. at 189 (Hodges deposition at 311-12)).

13. Hodges further testified in his deposition that his wife and Howell denied having an affair until they were deposed in October of 1997 in the context of the Hodges' divorce proceedings. (R. at 189 (Hodges deposition at 314)); (see also R. at 4, ¶ 20).

14. The Hodges' divorce was finalized on February 4, 1998. (R. at 170).

15. Hodges' complaint in this matter was filed with the Third District Court on October 20, 1998. (R. at 1).

V. Summary of Argument

The one-year statute governing the tort of seduction does not apply to AOA claims. In fact, AOA claims are elementally different in every way from the tort of seduction. Utah case law and statutes clearly define the act of seduction as requiring the enticement of an unmarried individual under the age of 18 to have unlawful sexual intercourse. See, e.g., Bowers v. Carter, 59 Utah 249, 250-51, 202 P. 1093, 1094-95 (Utah 1921); see also Utah Code Ann.§§ 78-11-4, 5 (1996). By contrast, the Utah Supreme Court has specifically stated that the tort of AOA does not include sexual contact or intercourse as a necessary element of the claim. see Norton v. Macfarlane, 818 P.2d 8, 12 (Utah 1991). Furthermore, in seduction, the person seduced must be under the age of 18 and must not be married. In AOA settings, marriage is a necessary element.

Also, the tort of AOA is much more akin to personal injury or wrongful death claims, both of which are typically governed by statutes of limitation of at least two years, and as many as four years. On at least two occasions, the Utah Supreme Court has compared the tort of AOA with wrongful death claims, and it equated the two claims together by noting that each involve the loss of society,

love, companionship, protection and affection. See Norton, 818 P.2d at 11-12; see also Nelson v. Jacobsen, 669 P.2d 1207, 1216 (Utah 1983).

Finally, even if the one-year statute of limitations for seduction applies to Hodges' AOA claim, the trial court erred when it construed the disputed facts as to when Hodges' AOA cause of action accrued in favor of Howell, the moving party. More specifically, Hodges set forth facts in his opposing memorandum that, when construed in a light most favorable to him (as required by law), created a genuine issue of material fact as to when his AOA cause of action accrued for statute of limitations purposes. Hodges established facts demonstrating that he still held out hope for reconciliation and was willing to work together with his estranged wife to repair the damage to their marriage and raise their children together as husband and wife, even after Linda Hodges filed for divorce. (R. at 168-71). The law encourages reconciliation and any efforts that may preserve the marital relationship. The law further presumes that there is always a possibility of reconciliation up until the divorce is finalized. To force Hodges to file a complaint for AOA while still holding out hope for reconciliation with his wife, which would occur if a one-year statute of limitations applies, would defeat the clear public policy favoring reconciliation and would force Hodges to risk losing the opportunity to reconcile by prematurely filing a lawsuit.

VI. Argument

A. HODGES' CLAIM FOR ALIENATION OF AFFECTIONS IS NOT GOVERNED BY THE ONE-YEAR STATUTE OF LIMITATIONS FOR SEDUCTION.

Howell's summary judgment motion hinged on the flawed presumption that the tort of AOA is subject to the one-year statute of limitations found at Utah Code Ann. § 78-12-29(4), and on the misguided inferences Howell draws from Hodges' deposition testimony as to when the AOA was complete and a cause of action for the same accrued. As demonstrated below, § 78-12-29(4) does not govern the tort of AOA and Howell's reliance on that section is wholly misplaced. Instead, Hodges' AOA claim is governed by Utah's four-year residual statute of limitations.[4]

1. The tort of AOA is not a specified tort under the one-year statute of limitations found at §78-12-29(4), and the tort of seduction is not at all related to the tort of AOA.

Title 78, Chapter 12 of the Utah Code establishes various statutes of limitation applicable to the commencement of civil actions. The statute of limitations relied on by Howell is found within Article 2 of Chapter 12. It establishes a one-year statute of limitations for specific enumerated torts:

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[4]Hodges does not concede that his AOA cause of action cannot survive a one-year statute of limitation. In fact, there are sufficient facts creating a genuine dispute as to when Hodges' cause of action for AOA accrued -- even if this Court concludes that Utah's one-year statute of limitations for seduction applies to Hodges' AOA claim.

An action may be brought within one year:

(1) for liability created by the statutes of a foreign state;
(2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;
(3) upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;
(4) for libel, slander, assault, battery, false imprisonment, or seduction;
(5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;
(6) against a municipal corporation for damages or injuries to property caused by a mob or riot;
(7) on a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:
(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to four-years, under Section 25-6-10; or
(b) Subsection 25-6-6(2).

Utah Code Ann. § 78-12-29 (1998 Supp.) (emphasis added). The tort of AOA is not enumerated or described whatsoever in § 78-12-29. Notwithstanding that obvious fact, Howell relied on subsection (4) of § 78-12-29 in his Motion for Summary Judgment and argued that the tort of AOA is akin to the tort of seduction. The trial court agreed. However, the fact of the matter is that seduction has very little, if anything, in common with AOA.

AOA is an intentional tort against the person. See Nelson v. Jacobsen, 669 P.2d 1207, 1217 (Utah 1983); see also Norton, 818 P.2d at 10. A plaintiff alleging AOA must be prepared to demonstrate three necessary elements in order to present a prima facia claim for AOA. First, he or she must establish that they

had a happy marriage and that genuine love and affection existed between them. Second, an AOA plaintiff must prove that the love and affection existing in the marriage was alienated and destroyed. Third, he or she must show that the wrongful and malicious acts of the defendant produced and brought about the loss and alienation of the love and affection that existed in the marriage, and that the defendant's conduct was the controlling cause of the alienation. See Nelson, 669 P.2d at 1218.

Seduction, on the other hand, is a cause of action that accrues with the seducer having carnal knowledge of the victim. The Utah Supreme Court defines seduction as follows:

> The act of seducing; enticement to wrongdoing; specifically the offense of inducing a woman to consent to unlawful sexual intercourse, by enticements which overcome her scruples; the wrong or crime of persuading a woman to surrender her chastity. . . the word 'seduced,' when applied to the conduct of a man toward a woman, has a defined and well-understood meaning; and a charge that defendant 'seduced, debauched, and carnally knew' plaintiff is tantamount to saying that he used some undue influence, artifice, deceit, fraud, or made some promise to induce the plaintiff to surrender her chastity and virtue to him.

Bowers v. Carter, 59 Utah 249, 250-51, 202 P. 1093, 1094-95 (Utah 1921) (citations omitted). This definition plainly demonstrates the significant differences between the tort of seduction and the tort of AOA. First, the tort of seduction requires that "sexual intercourse" occur. However, there is nothing

inherent in the tort of AOA requiring sexual contact to be part of the act or acts upon which an AOA claim is founded. See Nelson, 669 P.2d at 1216 (Utah 1983). In Nelson, the Utah Supreme Court made it very clear that the tort of AOA is not about sex; nor is sex a necessary element to the cause of action. Instead, the underlying basis for the tort of AOA is built "on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection." Id.

In Norton v. Macfarlane, 818 P.2d 8 (Utah 1991), the Utah Supreme Court emphasized this point in even greater detail.

> [T]he tort of AOA protects the marriage relationship from a variety of assaults by third persons, whether extramarital sexual affairs are involved or not. Sexual misconduct is only one means of destroying spousal affections. The gist of the tort is the protection of the love, society, companionship, and comfort that form the foundation of a marriage and give rise to the unique bonding that occurs in a successful marriage.

Id. at 12 (emphasis added). In other words, the tort of AOA was established to protect the marriage from third party attacks. Unlike claims for seduction, an AOA cause of action does not require that the attack on the marriage include an extramarital affair or sexual relations.

The tort of seduction is further distinguishable from the tort of AOA. As defined in Bowers, seduction typically involves enticing a person to surrender his or her virtue and chastity through "artifice, deceit, [or] fraud . . . ." Bowers, 202 P.

at 1094-95. Here, there was no trickery, deceit, fraud or artifice in Howell's actions. Instead, Howell made a bold, obvious and premeditated play for the affections of Hodges' wife and she voluntarily and knowingly chose to accept those advances in spite of her marital vows to Hodges.[5]

Furthermore, neither Hodges nor Linda Hodges could, under any circumstances relevant to this litigation, bring a claim for seduction. Instead, under Utah law, seduction must involve a minor, unmarried individual. The seduction statute states as follows.

> An unmarried individual, under 18 years of age at the time of seduction, may prosecute as plaintiff an action therefor, and may recover therein such damages, actual or exemplary as are assessed in favor of such individual.

Utah Code Ann. §78-11-4 (1996); see also § 78-11-5 (1996) (permitting parents or guardians to prosecute claims for the seduction of minor children).

Finally, the Utah Supreme Court has already cautioned against equating the tort of AOA with that of seduction. In Norton, the Utah Supreme Court agreed that "it is by no means certain that all four actions [AOA, seduction, criminal conversation and breach of promise to marry] should be lumped together for identical treatment." Norton, 818 P.2d at 13, n. 9. In fact, the Utah Supreme

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[5]Hodges did not plead the tort of seduction in his complaint. Had he done so, the cause of action for seduction would have accrued with the last act of seduction. See Slawek v. Stroh, 215 N.W.2d 9, 19 (Wis. 1974).

Court discussed the tort of wrongful death -- which is subject to a two-year statute of limitations -- in terms strikingly familiar to those defining AOA.

> It is the loss of **society, love, companionship, protection and affection** which usually constitute the heart of the [wrongful death] action. Stated somewhat differently, this Court has stated that recovery may be had for "the loss of affection, counsel and advice, the loss of deceased's care and solicitude for the welfare of his or her family and the loss of the comfort and pleasure the family of [the]deceased would have received. . . ."

Id. at 11-12 (emphasis added).

In Nelson, the Utah Supreme Court evaluated the claims of a defendant who sought a ruling abolishing the AOA cause of action. Nelson, 669 P.2d at 1207. In its decision to preserve the rights of a victimized spouse to sue for AOA, the Utah Supreme Court felt that AOA claims deserve as much protection as the cause of action for wrongful death.

> Our wrongful death statutes have long recognized the value of a plaintiff's interest in his or her relationships with family members. U.C.A., 1953, §§ 78-11-6, 78-11-7. We have repeatedly sustained a plaintiff's right to recover for the loss of society, love, companionship, protection and affection which usually constitute the heart of the [wrongful death] action. The marital relationship is entitled to as much protection as these.

Id. at 1215 (emphasis added). It follows that if a person victimized by the wrongful death of his or her spouse is entitled to two years to bring suit, so too

should a victim who loses his or her spouse as a result of the alienation of his or her affections by a third party have at least equal time to pursue his or her claims.[6]

Furthermore, not only is the tort of AOA not enumerated in section 78-12-29, this statute also is not the exclusive statute of limitation for all intentional torts. Rather, there are numerous statutes establishing different -- and usually longer -- limitations periods for various intentional torts. See Utah Code Ann.§§ 78-12-25(2) (establishing a four-year statute of limitation for actions based on the Uniform Fraudulent Transfer Act); 78-12-25.1 (establishing a four-year statute of limitation for actions involving the sexual abuse of a child); 78-12-26 (establishing a three-year statute of limitation for actions based on fraud or injury to property); 78-12-28 (establishing a two-year statute of limitation for wrongful death actions caused both by negligence and intentional conduct).

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[6] In May of 1997, the Utah Legislature enacted Utah Code Ann. § 30-2-11 (1997) which specifically established the right of an individual to sue for loss of consortium resulting from personal injury sustained by his or her spouse as a result of the wrongful or negligent actions of a third person. Under this statute, the spouse's consortium claims are subject to the same statute of limitations that applies to the other spouses' personal injury claims. Id. at § 30-2-11(3). Thus, if the spouse's personal injuries were caused by wrongful death or medical malpractice, the statute of limitations for the consortium claims would be two years. See id. at § 78-12-28(2) (establishing two-year limitations period for wrongful death); and § 78-14-4(1) (establishing two-year limitations period for medical malpractice claims). Personal injuries arising out of negligent acts, such as automobile accidents, slip and falls, and other intentional acts not covered by Section 78-12-29(4), would subject consortium claims to the four-year residual statute of limitations found at Utah Code Annotated § 78-12–25 (1996).

In short, the torts of AOA and seduction are vastly different and clearly unrelated to each other. That being the case, it is disingenuine and misleading for Howell to attempt to lump together the two claims for statute of limitations purposes. Furthermore, as is demonstrated below, there are other statutes of limitation which bear a greater and more logical fit to Hodges' AOA claim.[7]

2. The tort of AOA is subject to the four-year statute of limitations found at Utah Code Ann. §78-12-25 because it is not specifically enumerated in § 78-12-29.

As argued above, the tort of AOA is not enumerated in the one-year statute of limitations found at § 78-12-29 and is not sufficiently related to the tort of seduction (which is specifically enumerated in § 78-12-29) to warrant lumping the two together for statute of limitations purposes. This leaves the question of which statute of limitations applies if the one-year limitation period of § 78-12-29 does not.

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[7] In his motion for summary judgment, Howell cites the case of Tolman v. K-Mart Enterprises of Utah, Inc., 650 P.2d 1127, 1128 (Utah 1997) in support of his argument that AOA is related to the tort of seduction and should be subject to the one-year statute of limitations that applies to seduction. In Tolman, the Utah Supreme Court held that the tort of false arrest is subject to the same statute of limitations that applies to the tort of false imprisonment because false arrest is "but an aspect of false imprisonment. . . ." Id. In other words, false arrest is typically a sub-part or a component of false imprisonment if not itself a form of false imprisonment. Here, AOA is not a component of seduction, nor are the two torts in any way related. The only similarity between the two is that sexual intercourse is only one of many possible causes of the AOA but is not the only or required cause, whereas sexual intercourse is a necessary element claim for seduction. Howell's reliance on Tolman is therefore misplaced.

The Utah Supreme Court has provided on-point analysis which demonstrates that the four-year residual statute of limitations found at Utah Code Ann. § 78-12-25(3) should apply to the tort of AOA. Section 78-12-25(3) represents the Utah Legislature's efforts to provide a residual or "catch-all" statute of limitations for any causes of action which are not otherwise explicitly enumerated in other provisions establishing limitations periods. Subsection (3) of Utah's residual statue of limitations applies to all actions "for relief not otherwise provided for by law." Id. The Utah Supreme Court explained the use of this catch-all provision in Olsen v. Hooley, 865 P.2d 1345 (Utah 1993).

> A cause of action, such as intentional infliction of emotional distress, that is not subject to a specific statutory limitations period is governed by the residual four-year limitations period found in § 78-12-25(3). Intentional infliction of emotional distress, although traditionally viewed as an intentional tort, is not one of the torts enumerated in § 78-12-29(4) that have a one-year limitations period, and therefore falls within the residual statute of limitations.

Id. at 1347 n. 1 (emphasis added) (citations omitted); see also Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992) (comparing AOA with intentional infliction of emotional distress claims because both often involve "a series of wrongful acts over a substantial period of time . . .").

The above-analysis is plainly demonstrative of Hodges' position in this case. Just as the tort of intentional infliction of emotional distress ("IIED") is not enumerated in § 78-12-29, so too is the intentional tort of AOA omitted from

reference therein. Thus, while Hodges concedes that AOA is an intentional tort, as is IIED and seduction, AOA is no more related to seduction than any of the other intentional torts subject to other longer limitation periods. Therefore, because the tort of AOA is not assigned to a specific statute of limitation it is necessarily governed by the four-year "catch all" limitations period found in § 78-12-25(3).

Courts in other states have taken a similar approach and held that AOA claims are governed by residual or general statutes of limitation. See Schwartz v. Valinsky, 294 N.E.2d 446, 447 (Mass. App. Ct. 1973) (general limitations period for torts applies to claims for AOA); see also Gibson v. Gibson, 402 S.W.2d 647, 650 (Ark. 1968) (one-year statute of limitations for false imprisonment, slander and assault which does not mention AOA claims does not apply; instead, five-year statute of limitations for torts in general applies to claims of AOA); Smith v. Lyon, 9 Ohio App. 141 (Ohio 1918) (holding that four year general or catch-all statute of limitations governing claims "not arising on contract" applied to AOA claims); Farrow v. Roderique, 224 S.W.2d 630 (Mo. App. 1949) (applying general statute of limitations of five years to AOA claims in the absence of a statute specifically enumerating claims for AOA); Bassett v. Bassett, 20 Ill. App. 543 (Ill. 1886); Woodman v. Goodrich, 234 Wis. 565, 291 N.W. 768, 769 (Wis. 1940) (six-year limitation period for claims not arising in contract or not otherwise expressly provided for by statute applies to AOA claims).

The Gibson court noted the common and well-reasoned rule that courts should be reluctant to "apply a statute of limitations to actions not specifically enumerated therein." Gibson, 402 S.W.2d at 648. Hodges therefore requests this Court to rule consistent with the decision in the Olsen case and rule that claims for AOA are governed by the residual four-year statute of limitations found at Utah Code Ann. § 78-25-12(3).

B. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHEN HODGES' AOA CLAIM ACCRUED WHICH PRECLUDE SUMMARY JUDGMENT.

Summary Judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991). In ruling on summary judgment motions, trial courts are advised to view the facts in a light most favorable to the non-moving party. See id.

Howell argues that Hodges' cause of action for AOA accrued no later than January of 1997. Assuming this to be true, for the sake of argument, Howell's application of a one-year statute of limitation would clearly bar Hodges' complaint which was filed one year and nearly nine months later (October 1998). However, even if the one-year statute of limitations applies, Hodges' deposition testimony demonstrates that material issues of fact exist as to when the alienation of the affections of Hodges' wife was complete. As defined by law, the statute of

limitations for AOA begins to run "when the alienation is accomplished, i.e., when love and affection are finally lost." Retherford, 844 P.2d at 975.[8]

Specifically, while Hodges admits that the date of January 20, 1997 was a damaging step in the decline of his marriage with Linda Hodges, he also states several times in his deposition that he felt there was always a chance of reconciliation so long as he was married to Linda Hodges. Indeed, Hodges held out hope for such and was willing to try and salvage his marriage up until the time when the Hodges' divorce was finalized in February of 1998. See Hodges' Response to Howell's Statement of Facts (R. at 168-71) and Hodges' Additional Statement of Facts above. Moreover, Howell cannot point to any fact which demonstrates that as of January 20, 1997, Linda Hodges' affections for Hodges

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[8] Retherford did not involve claims for AOA. However, in discussing the application of the statute of limitations for acts which in their aggregate form constitute a claim for intentional infliction of emotional distress (IIED), the Retherford court referred to case law from other jurisdictions which recognize that like IIED, AOA claims arise from a "series of wrongful acts over a substantial period time," and "that the statute of limitations begins to run when the alienation is accomplished, i.e., when love and affection are finally lost." Retherford, 844 P.2d at 975. Therefore, while Utah courts have not directly addressed the question of when a claim or cause of action for AOA accrues, the above dicta in Retherford demonstrates that AOA and IIED claims are very similar in nature. Both are not explicitly included in any specific statute of limitations, and both accrue in similar fashion. Hodges' position that his AOA claim also falls within the residual four-year statute of limitations is therefore consistent and in harmony with this Court's analysis both in Retherford and in Olsen and should be treated in similar fashion for statute of limitations purposes.

and vice versa were "finally lost." In fact, Hodges did not file for divorce because of his desire to give reconciliation a chance.

Furthermore, "the law presumes that there is always a possibility of reconciliation of husband and wife and this the law encourages." Gibson, 424 S.W.2d 871, 874 (Ark. 1968). This same principle was recognized by the Utah Supreme Court in Wilson v. Oldroyd, 1 Utah 2d 362, 372-74, 267 P.2d 759, 767-68 (Utah 1954). In Wilson, the Utah Supreme Court sustained as proper the trial court's decision to issue a jury instruction that stated that "so long as the marriage status continues between a husband and wife, the law presumes that there is a possibility of reconciliation even though they have become estranged or have had marital differences." Id. at 1 Utah 2d at 373, 267 P.2d at 767. The primary cause of action alleged in Wilson was AOA.

The earliest Hodges may have felt that Linda Hodges' love was finally lost was October 27, 1997 when Linda Hodges and Howell both revealed the extent of their emotional relationship and for the first time admitted that their relationship included sexual relations. (R. at 189 (Hodges deposition at 314)); (see also R. at 4, ¶ 20). These facts were revealed in Linda Hodges' and Howell's deposition testimony in the divorce proceedings, and nearly four months before the Hodges' divorce was finalized.

In general, "[d]eliberate concealment by a defendant of the plaintiff's cause of action will toll the statute of limitations." Loomer v. Rittinger, 789 S.W.2d 16, 17 (Ky. Ct. App. 1989). Therefore, precisely when Hodges felt the alienation of his wife's affections was complete is a factual question that must be decided by the trier of fact. See Andreini v. Hultgress, 860 P.2d 916, 919 (Utah 1993) ("The governing law is clear. The point at which a person reasonably should know that he or she has suffered a legal injury is a question of fact"); see also Gibson, 424 S.2d at 875 (holding that AOA claim accrued sometime between the parties' separation and final divorce but the question of precisely when the claim accrued was a question for the jury).

Hodges does not deny having suspicions or knowing that his wife's relationship with Howell was damaging their marriage. However, Howell's arguments in support of his Motion for Summary Judgment, if accurate, would force someone in Hodges' position to choose between two possible courses of action: Pursue an AOA claim before all hope is lost or the divorce is finalized and thereby lose all hope for reconciliation, or, continue to give reconciliation a chance and avoid damaging that prospect by filing a lawsuit. Put in other terms, the choice Howell would have Hodges make is an unfair one. Sue now and avoid the risk of the short statute of limitations running, or risk losing your cause of action for AOA in order to give reconciliation every chance of succeeding.

Such choices are not only unfair, they are also unjust. The law always prefers and encourages settlement and reconciliation, not litigation. Many marriages survive and remain intact despite the infidelity of one spouse. The law should be construed to allow Hodges every opportunity to hold out hope and pursue reconciliation prior to proceeding down a course of action that would harm those opportunities. Many divorces, including the Hodges' divorce, take more time to fully resolve, one way or the other, than the one-year limitations period Howell would have this Court apply to Hodges' AOA claim. Four years gives every would-be-AOA claimant sufficient time to pursue every avenue of reconciliation before the law penalizes him or her and prevents him or her from seeking legal recourse against the offending third party.

In short, regardless of which statute of limitations applies to Hodges' claim for AOA, the question of when his cause of action for the same accrued is a question of fact for the jury to resolve, not the trial court. The trial court therefore erred in resolving such disputed factual issues in favor of Howell when it granted Howell's Motion for Summary Judgment.

C. THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE DETAILED FINDINGS OF FACT TO SUPPORT AND OUTLINE ITS DECISION THAT HODGES' AOA CLAIMS ACCRUED MORE THAN ONE YEAR PRIOR TO THE FILING OF HIS COMPLAINT

Rule 52(a) of Utah Rules of Civil Procedure provides that "the trial court shall find the facts specially and state separately its conclusions of law thereon." Here, the trial court utterly failed to provide any findings of fact or provide any discussion which would give any insight as to how the trial court reached its conclusion that Hodges' AOA claim accrued more than one year prior to the filing of his complaint. This violates the clear mandate of this state's appellate courts.

More specifically, a trial court's factual findings must contain enough detail to reveal the reasoning process undertaken by the trial court in reaching its decision. Williamson v. Williamson, 372 Utah Advance Reports 45, 46 (Utah App. 1999). Put in other terms, the Court's factual findings must be articulated in such a manner as to allow the basis of the ultimate conclusion to be understood. Jeffs v. Stubbs, 970 2.Pd 1234 1242 (Utah 1998), cert denied, 119 S.CT. 1803 (1999); see also Rucker v. Dalton 598 P.2d 1336, 1338 (Utah 1979).

In short, the trial court's minute entry and ruling, and the subsequent order signed by the trial court all fail to refer to any facts upon which the trial court relied in determining when Hodges' AOA claim accrued or when the affections of his wife were finally lost and alienated. The trial court further did not provide any

discussion or findings that explain how it dealt with the disputed issues of fact presented by Hodges in his opposition to Howell's Motion for Summary Judgment, or why the trial court felt that those facts were insufficient to create a genuine dispute as to the material facts associated with Howell's Motion for Summary Judgment.

Therefore, because this Court is not in a position to understand or delve into the basis for the trial court's ruling on these factual issues, a remand is in order. However, this issue and the alleged error of the trial court to make factual findings is clearly moot in the event this Court determines that the statute of limitations for AOA claims is four years rather than one year as argued by Howell. Therefore, Hodges submits this particular argument in the alternative only in the event that this Court determines that a one-year statute of limitations applies to Hodges' claims.

VII. Conclusion

The trial court erred in applying the one-year statute of limitations for seduction to Hodges' alienation of affection claims. Instead, the four-year residual statute of limitations applies and Hodges' complaint was filed well within the requisite four-year period. Additionally, the trial court erred when it resolved the factual dispute as to when Hodges' AOA claim accrued in favor of Howell

who was the moving party. Such questions constitute genuine issues of material fact to be decided by the trier of fact.

Hodges respectfully requests that this Court reverse the trial court's decision granting Howell's Motion for Summary Judgment and remand the case to the trial court for a jury trial.

Dated this 12th day of November 1999.

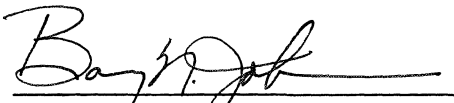
BENNETT TUELLER JOHNSON & DEERE, LLC
Barry N. Johnson
Daniel L. Steele
Attorneys for Defendant and Appellant Ryan Q. Hodges

VIII. Certificate of Service via First Class Mail

I CERTIFY that on November 12th, 1999, I served the foregoing BRIEF OF APPELLANT on the following person at the following address:

Erik A. Christiansen
James T. Blanch
Parsons, Behle & Latimer
201 South Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234
Attorneys for Appellee

by mailing by first class mail two true and accurate copies of the Brief of Appellant. Said copies were placed in a sealed envelope addressed to counsel for Defendant/Appellee at the address set forth above.



BENNETT TUELLER JOHNSON & DEERE, LLC
Barry N. Johnson
Daniel L. Steele
Attorneys for Defendant and Appellant
Ryan Q. Hodges

IX. Addendum

Exhibit A

Order and Final Judgment
Order and Judgment of Dismissal

Exhibit B

Notice of Appeal

Exhibit C

Utah Code Ann. § 78-12-29
Utah Code Ann. § 78-12-25

Tab A

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IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I

SALT LAKE COUNTY, STATE OF UTAH

* * * * * * *

RYAN Q. HODGES,

Plaintiff,

v.

REESE S. HOWELL, and SALT LAKE MORTGAGE CORPORATION, a Utah Corporation,

Defendants.

ORDER AND JUDGMENT OF DISMISSAL

Case No. 980910505MI

Judge Homer F. Wilkinson

The Court, having reviewed Defendant Salt Lake Mortgage Corporation's motion to dismiss Plaintiff's claims against it for failure to state a claim upon which relief can be granted, having reviewed the memoranda of the parties submitted in support of and in opposition to said motion, having issued a Ruling dated February 11, 1999 granting said motion, and being otherwise fully advised in the premises, hereby ORDERS, ADJUDGES, and DECREES as follows:

Plaintiff's claims against Defendant Salt Lake Mortgage Corporation fail to state claims upon which relief can be granted and are hereby DISMISSED.

IT IS SO ORDERED this 8 day of ~~February~~, 1999.

BY THE COURT:

Honorable Homer F. Wilkinson
Third District Court Judge

Approved as to form and content:

D. Michael Nielson
Attorney for Plaintiff

Erik A. Christiansen
Attorney for Defendants

ERIK A. CHRISTIANSEN (7372)
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Third-Party Plaintiff
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IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I

SALT LAKE COUNTY, STATE OF UTAH

RYAN Q. HODGES, Plaintiff, vs. REESE S. HOWELL, and SALT LAKE MORTGAGE CORPORATION, a Utah Corporation, Defendants.	**ORDER AND FINAL JUDGMENT** Case No. 980910505MI Judge Homer F. Wilkinson
REESE S. HOWELL, Third-Party Plaintiff, **vs.** LINDA M. HODGES, Third-Party Defendant.	

The Court, having reviewed Defendant Reese S. Howell's Motion for Summary Judgment (Statute of Limitations), having reviewed the memoranda and other materials submitted by the parties in support of and in opposition to said motion, having issued a Minutes 4-501 Ruling dated May 27, 1999 granting said motion, and being otherwise fully advised in the premises, hereby ORDERS, ADJUDGES, and DECREES as follows:

1. The Court hereby enters summary judgment in favor of Defendant Reese S. Howell on Plaintiff's alienation-of-affections claim against him, which claim is hereby DISMISSED with prejudice. As grounds for this summary judgment, the Court holds that the applicable statute of limitations for Plaintiff's alienation-of-affections claims is Utah Code Ann. section 78-12-29(4), which imposes a one-year limitations period. Based on the materials submitted in support of and in opposition to Defendant's motion, the Court holds that Plaintiff's claim is time-barred because there is no genuine factual dispute that the alienation of affection to the Plaintiff in this case occurred more than one year prior to October 20, 1998, the date the Complaint was filed.

2. As a result of the foregoing summary judgment, Defendant Reese S. Howell's third-party claim for apportionment of fault against Linda M. Hodges is moot and is hereby dismissed.

3 This Order, together with the an earlier Order of this Court dated March 15, 1999, disposes of all claims against all parties in this action. This Order therefore constitutes the Court's FINAL JUDGMENT in this action, and the Court hereby dismisses this action in its entirety, with Plaintiff to bear Defendant's costs as provided in Utah R. Civ. P. 54(d)(1).

IT IS SO ORDERED this 16 day of June, 1999.

BY THE COURT:

Honorable Homer F. Wilkinson
Third District Court Judge

Approved as to form and content:

James T. Blonz
Attorney for Defendants

Barry N. Johnson
Attorney for Plaintiff

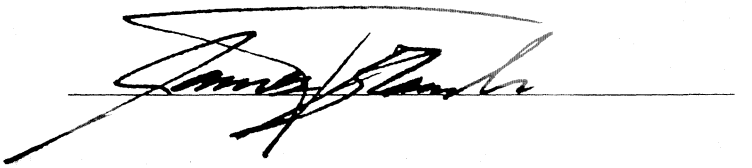
Steven B. Wall
Attorney for Third-Party Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 1999, I caused to be sent by facsimile true and correct copies of the foregoing **ORDER AND FINAL JUDGMENT** to:

Barry N. Johnson
Bennett Tueller Johnson & Deere, LLC
3865 South Wasatch Blvd., Suite 300
Salt Lake City, Utah 84109

Steven B. Wall
Wall & Wall, a.p.c.
5200 South Highland Dr. #300
Salt Lake City, UT 84117



This

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * * * *

RYAN Q. HODGES,

Plaintiff,

vs.

REESE S. HOWELL, and SALT LAKE MORTGAGE CORPORATION, a Utah Corporation,

Defendants.

REESE S. HOWELL,

Third-Party Plaintiff,

vs.

LINDA M. HODGES,

Third-Party Defendant.

NOTICE OF APPEAL

Civil No. 980910505MI

Judge Homer F. Wilkinson

* * * * * * *

(1) Notice is hereby given that plaintiff and appellant, Ryan Q. Hodges, by and through his undersigned counsel Bennett Tueller Johnson & Deere , LLC, appeals to the Utah Supreme Court the final order and judgment entered in this matter on June 16, 1999 by the Honorable Judge Homer F. Wilkinson of the Third Judicial District Court in and for Salt Lake County.

The appeal is taken from the final order and judgment granting Defendant Reese Howell's Motion for Summary Judgment on statute of limitations grounds, a copy of which is attached for reference.

DATED this 12 day of July, 1999.

BENNETT TUELLER JOHNSON & DEERE, LLC

Barry N. Johnson
Daniel L. Steele
Thomas B. Price
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of July, 1999, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **NOTICE OF APPEAL** to:

Erik A. Christiansen
James T. Blanch
Angie Nelson
PARSONS BEHLE & LATIMER
201 South Main Street , Suite 1800
P.O. Box 45898
Salt Lake City, Utah 84145-0898

Daniel L. Steele

Tab C

COLLATERAL REFERENCES

C.J.S. — 54 C.J.S. Limitations of Actions § 33 et seq.

Key Numbers. — Limitation of Actions ⇦ 58(2).

78-12-25. Within four years.

An action may be brought within four years:

(1) upon a contract, obligation, or liability not founded upon an instrument in writing; also on an open account for goods, wares, and merchandise, and for any article charged on a store account; also on an open account for work, labor or services rendered, or materials furnished; provided, that action in all of the foregoing cases may be commenced at any time within four years after the last charge is made or the last payment is received;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

(b) Subsection 25-6-5(1)(b); or

(c) Subsection 25-6-6(1);

(3) for relief not otherwise provided for by law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-25; L. 1988, ch. 59, § 14; 1996, ch. 79, § 110.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within"; deleted "An action" at the beginning of Subsections (1) and (3); and made stylistic changes.

Cross-References. — Antitrust Act actions, § 76-10-925.

Product Liability Act, statute of limitations, § 78-15-3.

NOTES TO DECISIONS

ANALYSIS

COLLATERAL REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d Death § 56 et seq.; 51 Am. Jur. 2d Limitation of Actions § 103; 63A Am. Jur. 2d Public Officers and Employees § 548 et seq.; 70 Am. Jur. 2d Sheriffs, Police and Constables §§ 236 to 240.

C.J.S. — 54 C.J.S. Limitations of Actions §§ 69, 75.

A.L.R. — Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R.4th 972.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice, 70 A.L.R.4th 535.

Fraudulent concealment of cause of action for wrongful death as affecting period of limitations, 88 A.L.R.4th 851.

Key Numbers. — Limitation of Actions ⇨ 31, 34(3).

78-12-29. Within one year.

An action may be brought within one year:

(1) for liability created by the statutes of a foreign state;

(2) upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation;

(3) upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state;

(4) for libel, slander, assault, battery, false imprisonment, or seduction;

(5) against a sheriff or other officer for the escape of a prisoner arrested or imprisoned upon either civil or criminal process;

(6) against a municipal corporation for damages or injuries to property caused by a mob or riot;

(7) on a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to four years, under Section 25-6-10; or

(b) Subsection 25-6-6(2).

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-29; L. 1988, ch. 59, § 15; 1989, ch. 22, § 50; 1996, ch. 79, § 113.

Amendment Notes. — The 1996 amendment, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within"; deleted "An action" in the beginning of Subsections (1) to (6); and made stylisic changes.

Cross-References. — Libel, Title 45, Chapter 2.

Riot, response and recovery, Title 63, Chapter 5a.

Seduction, §§ 78-11-4, 78-11-5.

NOTES TO DECISIONS

Analysis

Action for penalty or forfeiture.
Dismissal of action.
— Institution of second action.
Excessive freight charges.
"False arrest."
Federal civil rights actions.
Foreign statute.
— Stockholder's liability.
Libel.
Pleading.
— Amendment of answer.
— — Conditions.
— Specificity.
Reckless misconduct.
— Negligence.
Running of statute.
— Delinquent taxes.
— — Filing of return.
— Fraud.
— — Discovery.